> purposes of title II. . . . Title II makes no reference and imposes no liability on those acting for the benefit of, or as the agent for, common carriers. . . . Therefore, NECA may not be held accountable for any alleged violations of title II due to its non-carrier status.

741 F. Supp. at 985 (citations omitted).[6] The Allnet court relied on its earlier unpublished decision in American Sharecom, Inc. v. Southern Bell Tel. & Tel. Co., 1989 WL 229397 (D.D.C. 1989), which held that Bellcore, DSMI's parent, was not a common carrier when it performed functions under the 1934 Act as agent for the BOCs:

> Plaintiffs admit that the two sections under which relief is sought [47 U.S.C. §§ 206, 207] refer to common carriers only and that Bellcore and NECA are not common carriers. They argue, however, that because these defendants acted as filing agents for common carriers [with respect to the filing of WATS tariffs] and performed functions under Section 203(a) of the Communications Act, they can be considered common carriers for purposes of this action.
>
> Assuming arguendo that Bellcore and NECA performed acts pursuant to Section 203(a), this does not transform them into common carriers for purposes of sections 206 and 207. These two sections impose liability on common carriers for any act performed by them in violation of the Communications Act. Neither section makes reference to those acting for the benefit of, or as the agent for, common carriers. Indeed, plaintiffs do not cite any authority which even indicates that those who perform tasks pursuant to section 203(a) or any other provision of the Act, become the agent of common carriers such that they are liable under sections 206 and 207.
>
> Accordingly, there is no statutory authority upon which to base liability against Bellcore and NECA as they are not common carriers. Defendants motion to dismiss the Communications Act claims . . . against these two defendants is, therefore, granted.

1989 WL 229297 at 5 (footnotes omitted). *See also*, In the Matter of Communique Telecommunications, Inc., 10 F.C.C. Rcd. 10399 (1995), in which the FCC followed

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[6] On appeal, the D.C. Circuit Court held that the issues raised should be referred to the F.C.C. under the doctrine of primary jurisdiction, and on that basis affirmed the dismissal of the action. The court observed: "Given the concern for uniformity and expert judgment, it is hardly surprising that courts have frequently invoked primary jurisdiction in cases involving tariff interpretations—an issue closely related to the central issues here, compliance of a tariff with regulatory standards and the consequences of imperfect compliance." 965 F.2d at 1120.

the rulings of Allnet and American Sharecom, holding that even though NECA was not a common carrier, it could file tariffs and bill and collect charges for its common carrier members.[7] The holdings of the foregoing cases, which dealt with the issue of status as a common carrier, should be extended to apply also to the question of DSMI's status as an incumbent LEC.

Under these authorities, DSMI cannot be deemed a common carrier nor an incumbent LEC simply because it acts as the agent for Bellcore or the BOCs in administering access to the SMS/800 system.

4. The FCC has not held that DSMI is a common carrier or an incumbent LEC.

In the CompTel Declaratory Ruling, 8 FCC Rcd. 1423 (1993) [see Am. Countercl. ¶ 33], the FCC did not hold that DSMI is a common carrier. Indeed, DSMI was not even in existence when that order was issued. Rather, the FCC simply held that SMS/800 access was a common carrier service, for which the *BOCs* should file tariffs.

Even the order in Beehive's own case (Am. Countercl. ¶¶ 37-38) does not hold that DSMI is a common carrier or an incumbent LEC. The FCC merely stated: "The creation of DSMI, a wholly-owned subsidiary of Bellcore, does not change the fact that the **BOCs** control all fundamental aspects of the SMS access through Bellcore."

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[7] The FCC also held that Section 217 of the 1934 Act did not preclude NECA's ability to file tariffs as agent of its member LECs:

> We find no basis for Communique's assertion that Section 217 reflects a congressional intent to restrict the activities of carriers' agents and that Section 203 and Section 217 preclude NECA from acting as agent for its member companies by developing tariffs and billing and collecting funds pursuant to those tariffs.

This holding undercuts Beehive's argument that Section 217 makes DSMI a common carrier because it acts as agent for the BOCs.

(*See* Beehive's Memo. in Response to DSMI's Motion to Dismiss Counterclaim, p. 8) The FCC merely confirmed its ruling in the CompTel Declaratory Ruling that SMS/800 access is incidental to, hence part of, a common carrier service.

Finally, the FCC's recently released First Report and Order, implementing the 1996 Act, does not state or imply that DSMI is a common carrier or an incumbent LEC. *See* First Report and Order, Docket No. 96-98 (Common Carrier Bureau, released August 8, 1996). In that case, the FCC merely held "that incumbent LECs should provide access, on an unbundled basis, to the service management systems (SMS), which allow competitors to create, modify, or update information in call-related databases." *Id.* at 236. It did not hold that DSMI or other agents of incumbent LECs are themselves incumbent LECs.

B. BEEHIVE IS NOT ENTITLED TO A DECLARATORY JUDGMENT WITH RESPECT TO ALLEGED OBLIGATIONS OF THE BOCS, WHERE THE BOCS ARE NOT PARTIES TO THIS ACTION.

In effect, Count I is asking for a declaratory judgment with respect to the BOCs' obligation to provide "non-discriminatory access" to the SMS/800. *See* Am. Countercl. ¶ 56. However, the BOCs are not parties to this case. DSMI is not a BOC, nor an incumbent LEC. It does not have the ability to enter into an "intercarrier agreement," since it is not a carrier. Therefore, it does not have a direct interest in the issue raised by Count I. Accordingly, DSMI's presence in the case does not create a justiciable case or controversy.

Whether under the Declaratory Judgment Act, 28 U.S.C. § 2201(a),[8] or under

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[8] The Declaratory Judgment Act states in pertinent part as follows:
In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, **may** declare the rights and other legal relations of any interested party seeking such declaration, whether or not f urther relief

the United States Constitution, a federal court has no jurisdiction unless there is an actual controversy between the parties that are before the court.

> "[T]he federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues 'concrete legal issues, presented in actual cases, not abstractions' are requisite. This is as true of declaratory judgments as any other field." United Public Workers of America (C.I.O.) v. Mitchell, 330 U.S. 75, 89, 67 S.Ct. 556, 564, 91 L.Ed. 754 (1947). "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in very [sic] case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941).

Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959-60 (1969). In the present case, since DSMI cannot enter into an "intercarrier agreement" with Beehive, there is no case or controversy for purposes of Article III, and no "actual controversy" for purposes of the Declaratory Judgment Act. Since any order the Court may enter with respect to the BOCs' obligation to enter into negotiations or intercarrier agreements with Beehive would not be binding on the BOCs, which are not parties to this action, and because DSMI would not be a party to any such agreements, Count I must be dismissed for lack of a case or controversy. *See* State Farm Mutual Auto. Ins. Co. v. Mid-Continent Casualty Co., 518 F.2d 292, 295 (10th Cir. 1975); Verosol B.V. v. Hunter Douglas, Inc., 806 F. Supp. 582, 586-87 (E.D. Va. 1992).

> is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a). Thus even if an actual controversy exists, the Court has discretion not to hear it.

II. THE COURT DOES NOT HAVE JURISDICTION TO RENDER A DECISION ON WHETHER DSMI IS AN IMPARTIAL ENTITY WITHIN THE MEANING OF 47 U.S.C. § 251(e), WHERE CONGRESS HAS EXPRESSLY DELEGATED SUCH DECISION TO THE FCC.

Count II seeks a declaratory judgment that DSMI is not an "impartial entity" for purposes of 47 U.S.C. § 251(e), as well as an order "removing DSMI as such 800 number administrator and undoing its unlawful acts while serving as such administrator." Am. Countercl. ¶ 64. 47 U.S.C. § 251(e) provides that the FCC "shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis." Notwithstanding Beehive's assertion that "the 800 number administrator, among other considerations, must not be aligned with any particular segment of the telecommunications industry," [Am. Countercl. ¶ 61] the statute provides no criteria for determining who might be "impartial."

Beehive asserts that because the FCC has not acted within six months from enactment of the 1996 Act to designate an impartial entity,[9] the Court should remove DSMI as the 800 number administrator. *See* Am. Countercl. ¶ 64. Beehive does not suggest who the replacement administrator should be, nor how the SMS/800 system could function without an administrator.

More importantly, Beehive has not suggested a jurisdictional basis for the Court to usurp the FCC and to make a determination which Congress has expressly

[9] 47 U.S.C. § 251(d)(1) provides: "Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirement of this section."

delegated to the FCC.[10] The Court lacks jurisdiction (to say nothing of means) to perform the function of selecting an impartial entity to administer the SMS/800, because the judicial branch of government cannot exercise powers and functions that Congress has delegated to an administrative agency. *See, e.g.*, Federal Power Comm'n v. Idaho Power Co., 344 U.S. 17, 73 S.Ct. 85, 97 L.Ed. 15 (1952); Montana Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246, 71 S.Ct. 692, 694-95, 95 L.Ed. 912 (1951); Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co., 173 F.2d 784, 788-89 (6th Cir. 1949); *see also*, 73 C.J.S., Public Administrative Law and Procedure § 34 ("the courts ordinarily have no power . . . to determine administrative questions . . . ."). Furthermore, the declaratory and injunctive relief sought by Beehive—declaring that DSMI is not an impartial entity and prohibiting DSMI from acting as the administrator of the SMS/800 system, without providing for a replacement—would likely cause the collapse of the 800 number system, destroying number portability for 800 numbers, which is contrary to public policy. *See* 47 U.S.C. §§ 153, 251(b)(2); *In the Matter of Telephone Number Portability*, 10 F.C.C. Rcd. 12350, ¶¶ 1-7 (1995); *800 Access*, 6 F.C.C. Rcd. 5421 (1991), 7 F.C.C. Rcd. 8616 (1992).[11] The Court should dismiss Count II because it seeks to have the Court perform an administrative function delegated to the FCC, for which the Court lacks jurisdiction.

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[10] While a writ of mandamus might be available in a proper case to compel the FCC to designate an impartial entity to administer the SMS/800, Beehive did not seek a writ of mandamus, nor would such an effort have been successful. Manifestly, since the FCC is not a party to this case, the Court could not issue an order compelling the FCC to do its statutory duty, as Beehive perceives it.

[11] Beehive, of course, has always been opposed to number portability for "its" 10,000 800 numbers. *See* Am. Counterclaim ¶¶ 26-28, 34-37. Hence any action that would prevent the operation of the SMS/800 system, a primary purpose of which is to provide number portability for 800 numbers, would be to Beehive's advantage.

III. BEEHIVE LACKS STANDING TO CHALLENGE THE PROPRIETY OF RECOVERY OF THE COSTS OF ADMINISTRATION OF THE SMS/800 TARIFF FROM NON-TELECOMMUNICATIONS CARRIERS.

In Count III, Beehive challenges the SMS/800 Tariff on the ground that the costs of its administration are recovered in part from RespOrgs which are not telecommunications carriers, whereas 47 U.S.C. § 251(e)(2) provides:

> The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

See Am. Countercl. ¶¶ 66-69. Apparently Beehive interprets this statute as meaning that the cost of SMS/800 administration must be borne **only** by telecommunications carriers, even though the statute does not say that. Beehive reasons further that because the SMS/800 Tariff permits or requires recovery of costs from all RespOrgs, including those that are not telecommunications carriers, the Tariff is unlawful and invalid. *See* Am. Countercl. ¶ 69.

Beehive alleges that it is a telecommunications carrier [*see* Am. Countercl. ¶¶ 54], but does not and could not allege that telecommunications carriers are or should be exempt from bearing the costs of administration of the SMS/800 Tariff. Even assuming that Beehive's interpretation of the statute is correct, it is incomprehensible why Beehive would complain that RespOrgs that are *not* telecommunications carriers bear some of the costs of administering the SMS/800 Tariff, since that fact *reduces* the proportionate costs to be borne by the RespOrgs which *are* telecommunications carriers, including Beehive. Thus Beehive receives a benefit, not an injury, from the collection of SMS/800 administrative costs from non-telecommunications carriers.

In any event, Beehive has *alleged* no injury to itself from the practice of requiring non-telecommunications carrier RespOrgs to bear a portion of the costs of administering the SMS/800 Tariff.[12] In the absence of such an allegation, Beehive does not have standing to challenge the recovery of costs from a class to which it does not belong. *See* U.S. Const. art. III, § 2; Chrisman v. Comm'r, 82 F.3d 371, 373 (10th Cir. 1996) (to have standing, a plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief); Oklahoma Hospital Ass'n v. Oklahoma Publishing Co., 748 F.2d 1421, 1424 (10th Cir. 1984) (a plaintiff cannot base its claim to relief on the legal rights of third parties). Accordingly, Count III fails to state a claim upon which relief can be granted, and must be dismissed for lack of jurisdiction.

IV. COUNT IV FAILS TO STATE A CLAIM AGAINST DSMI ON WHICH RELIEF CAN BE GRANTED, BECAUSE DSMI IS NEITHER A COMMON CARRIER NOR AN INCUMBENT LOCAL EXCHANGE CARRIER.

Count IV alleges that DSMI has an obligation under the SMS/800 Tariff to "serve Beehive as Beehive has requested," [Amended Counterclaim ¶ 71], meaning that DSMI must cease the disconnection of Beehive's '800' numbers, re-connect all '800' numbers it had disconnected, and restore Beehive's status as a RespOrg.[13] [Amended Counterclaim ¶ 52] Beehive alleges further that the BOCs and DSMI have "refused to negotiate an agreement under which Beehive can obtain

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[12] If Beehive's interpretation of 47 U.S.C. § 251(e)(2) were correct, it would create another more serious problem, namely that the rates for SMS/800 service would have to be higher for telecommunications carriers than for other RespOrgs, to cover the cost of administration. This would create an obvious discrimination against telecommunications carriers.

[13] Beehive fails to note that it has recently become qualified as a RespOrg.

nondiscriminatory access to the SMS/800 at a technically feasible time." [Amended Counterclaim ¶71]

The legal bases asserted for Count IV are alleged violations of Sections 201 and 202(a) of the 1934 Communications Act, 47 U.S.C. §§ 151 et seq. (1934) ("1934 Act") and Section 251(c) of the Telecommunications Act of 1996, 47 U.S.C. §§ 251(c) (1996) ("1996 Act"). [Amended counterclaim ¶ 72] For such alleged violations, Beehive seeks, inter alia, injunctive relief requiring DSMI to cease disconnecting the "800" numbers previously assigned to Beehive, to reconnect the numbers already disconnected, to restore Beehive's RespOrg status, and not to assign any of Beehive's "800" numbers to any other entity.

Beehive's Amended Counterclaim seeking to hold DSMI liable for violations of the 1934 Act or the Telecommunications Act of 1996 ("1996 Act") depends on a threshold finding that DSMI is a common carrier (for purposes of Sections 201 and 202 of the 1934 Act) or an incumbent local exchange carrier ("incumbent LEC") (for purposes of Section 251 of the 1996 Act). However, DSMI is neither a common carrier nor an incumbent LEC. *See* argument in Section I.A., *supra* pp. 2-8. Therefore, Count IV fails to state a claim against DSMI upon which relief can be granted.

V. COUNT V FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST DSMI, BECAUSE DSMI DOES NOT INDEPENDENTLY REGULATE 800 NUMBER ADMINISTRATION, BUT DOES SO ONLY AS AGENT OF THE BOCS.

In Count V, Beehive appears to assert that only common carriers may administer "800" numbers, implying that common carriers may not do so through

agents which are not themselves common carriers.[14] On that basis, Beehive asserts that since DSMI is not a common carrier, DSMI's actions in administering the SMS/800 Tariff on behalf of the BOCs have been "illegal, unlawful, invalid, and unenforceable." *See* Am. Countercl. ¶ 78. Beehive cites no authority, statutory or otherwise, in support of its position. However, previously cited authority holds that common carriers may lawfully act through agents that are not common carriers, with respect to the administration of tariffs. *See, e.g.,* Allnet Communication Service, Inc. v. National Exchange Carrier Association, Inc., 741 F. Supp. 983 (D.D.C. 1990), *aff'd,* 965 F.2d 1118 (D.C. Cir. 1992); American Sharecom, Inc. v. Southern Bell Tel. & Tel. Co., 1989 WL 229397 (D.D.C. 1989); In the Matter of Communique Telecommunications, Inc., 10 F.C.C. Rcd. 10399 (1995).[15] *See* discussion, *supra* § I.A.2. Therefore, Count V fails to state a claim against DSMI on which relief can be granted.

VI. COUNT VI FAILS TO STATE A CLAIM AGAINST DSMI UPON WHICH RELIEF CAN BE GRANTED BECAUSE BEEHIVE HAD NO PROPRIETARY INTEREST IN NOR RIGHT TO HAVE PARTICULAR "800" NUMBERS ASSIGNED EXCLUSIVELY TO IT, NOR ANY RIGHT TO STOCKPILE ASSIGNED NUMBERS FOR FUTURE MARKETING PURPOSES.

In Count VI, Beehive again assumes that it has a superior right, apparently

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[14] In this regard, Beehive's position is inconsistent with its assertion in Count II that only "impartial entities" may administer "800" numbers, unless Beehive is willing to admit that a common carrier can be an impartial entity. It is not likely that Beehive is willing to make that concession.

[15] The FCC also held that Section 217 of the 1934 Act did not preclude NECA's ability to file tariffs as agent of its member LECs:

> We find no basis for Communique's assertion that Section 217 reflects a congressional intent to restrict the activities of carriers' agents and that Section 203 and Section 217 preclude NECA from acting as agent for its member companies by developing tariffs and billing and collecting funds pursuant to those tariffs.

This holding undercuts Beehive's argument that Section 217 makes DSMI a common carrier because it acts as agent for the BOCs.

lasting into perpetuity, to control the 10,000 "800" numbers that were once assigned to it; hence it has the right to have those numbers "restored," even after they had been disconnected because Beehive refused to designate a RespOrg for those numbers. Beehive alleges that DSMI has wrongfully refused to restore all 10,000 numbers, but fails to mention that DSMI is under a court order to do nothing with those numbers pending further order of the court. Beehive seeks an order of restoral, which is the same relief that it sought, and that the Court denied with respect to all but approximately 200 numbers, in the preliminary injunction proceeding in June, 1996.

In order to establish a right to the injunctive relief that it seeks, Beehive must prove that it has a proprietary right to those particular numbers, superior to the rights of other members of the public. It cannot make such a showing, because customers do not acquire any proprietary interest in telephone numbers that may be assigned to them. *See, e.g.,* Bullaro & Carton v. Griswold, 958 F.2d 374 (7th Cir. 1992); Shehi v. Southwestern Bell Tel. Co., 382 F.2d 627 (10th Cir. 1967); Atkin, Wright & Miles v. Mountain States Tel. & Tel. Co., 709 P.2d 330 (Utah 1985); First Central Service Corp. v. Mountain Bell Tel. Co., 95 N.M. 509, 623 P.2d 1023 (1981). With respect to "800" numbers, the SMS/800 tariff contains similar provisions. *See* Affidavit of Michael Wade, previously filed herein. Therefore, Beehive has no proprietary right or claim to the 10,000 "800" numbers in question.

The Amended Counterclaim now makes clear Beehive's intent to capture the 10,000 "800" numbers with the 629 prefix, in order to market those numbers to the public to the exclusion of any other potential competitor. *See* Am. Countercl. ¶ 26. However, public policy demands that all such numbers, including the ones that

DSMI has reconnected pursuant to this Court's preliminary injunction order, should be available to all members of the public, through any RespOrg, on an equal access basis. *See* Erdmann Technologies Corp. v. U S Sprint Com. Co., 1992 WL 77540 (S.D.N.Y 1992); FCC Report and Order, 4 F.C.C. Rcd. 2824, 2844 fn. 182 (Apr. 21, 1989) (stockpiling "800" numbers for long periods of time without using them is not in the public interest). Accordingly, it would be a violation of public policy to grant the relief requested by Beehive in Count VI.

Because Beehive does not have a proprietary interest in the numbers it seeks, Count VI does not state a claim against DSMI upon which relief can be granted.

VII. COUNT VII SHOULD BE DISMISSED BECAUSE, TO THE EXTENT IT ALLEGES A TARIFF VIOLATION, IT MUST BE REFERRED TO THE FCC, AND TO THE EXTENT IT ALLEGES A DUE PROCESS VIOLATION, IT FAILS TO ALLEGE "STATE ACTION" OR A PROTECTED PROPERTY RIGHT.

In Count VII, Beehive alleges that "[b]y repossessing the numbers before notice, negotiation and a hearing, DSMI violated the terms of the [SMS/800] Tariff and the due process clause of the Fifth Amendment to the United States Constitution." (Am. Countercl. ¶ 94) To the extent Beehives alleges a violation of the Tariff, such claim must be referred to the FCC under the primary jurisdiction doctrine. *See* Section VIII, *infra*. To the extent Beehive attempts to allege a due process violation by DSMI, a private entity, such claim fails to state a claim for relief for want of "state action" and, independently, for want of a constitutionally protected property interest.

A. BEEHIVE FAILS TO ALLEGE "STATE ACTION" IN SUPPORT OF ITS DUE PROCESS CLAIM.

With respect to a due process claim, there is an "'essential dichotomy' between

government action, which is subject to scrutiny under the [Fifth] Amendment, and private conduct, which . . . is not subject to the [Fifth] Amendment's protections." Gallagher v. "Neil Young Freedom Concert", 49 F.3d 1442, 1446 (10th Cir. 1995) (affirming this Court's summary judgment based on lack of "state action" under Fourth and Fourteenth Amendments).

DSMI is a private corporation, owned by private corporations. *See* AAm. Countercl. ¶ 21. Nevertheless, Beehive attempts to allege "state action" by DSMI as follows:

> By purporting to act under the SMS/800 Tariff in repossessing the 629-xxxx numbers from Beehive, DSMI was acting in a governmental or quasi-governmental status and/or pursuant to or under color of a governmental or quasi-governmental instrumentality, namely the SMS/800 Tariff.

Am. Countercl. ¶ 90. Other than "by purporting to act under the [ ] Tariff," Beehive alleges no facts to support its allegations that DSMI was "acting in a governmental status" or "pursuant to or under color of a governmental instrumentality." *See* Am. Countercl. ¶¶ 88-95.

Aside from the lack of logic in this allegation, its import, if accepted, would be to make every utility, every railroad, every trucking company, and every other entity that acts pursuant to tariff authority granted by a governmental agency, a "state actor," such that its actions toward any member of the public would have to be preceded by notice and a hearing. There is simply no basis for such an absurd conclusion. Decisions of the United States Supreme Court, the Tenth Circuit, and at least one other court have rejected the argument that a privately owned utility company engages in "state action" by acting pursuant to a tariff filed with the governing agency, or merely by virtue of its extensive regulation by the government.

See Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350, 354 (1974) (holding that a "heavily regulated, privately owned [electric] utility " did not engage in "state action by terminating a customer's service pursuant to a tariff filed with the state); Teleco, Inc. v. Southwestern Bell Tel. Co., 511 F.2d 949, 951-52 (10th Cir. 1975) (argument that defendant deprived plaintiff of due process rights by interrupting its telephone service without a hearing fails under the Jackson "state action" analysis); *accord*, Occhino v. Northwestern Bell Tel. Co., 675 F.2d 220, 224-25 (8th Cir. 1982) (where telephone utility "merely enforced its own rules and regulation" on file with the regulating agencies and the record fails to show any "close nexus" between the government and the telephone utility's actions in discontinuing service, such action was not under color of state law"). Those cases are dispositive of the "state action" issue in this case. Beehive has failed to allege any facts which distinguish its allegations of "state action" from the facts and allegations in Jackson, Teleco, and Occhino.

Furthermore, Beehive's pleadings fail to contain any support for a finding of "state action" under any of the four tests summarized by the Tenth Circuit in Gallagher. *See* 49 F.3d at 1447. First, the mere fact that DSMI "purported to act under a Tariff" does not allege "a sufficiently close nexus between the [government] and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the [government] itself. *Id.* (quoting Jackson, 419 U.S. at 351). Second, no facts are (or could be) alleged to suggest any "interdependence" or "symbiotic relationship" between DSMI and the government, as those terms are used in the context of a "state action" analysis. *Id.* (quoting Burton v. Wilmington Parking

Auth., 365 U.S. 715, 725 (1961); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972)). Third, Beehive allegles no "joint activity" between DSMI and the government, much less that DSMI was a "willful participant" in such joint activity. *Id.* (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152 (1970)). Finally, DSMI does not exercise any "powers traditionally exclusively reserved to the State," as defined in the cases. *Id.* (quoting Jackson, 419 U.S. at 352).

Beehive cannot allege any facts to suggest that either the federal government or a state government "put its own weight on the side of" DSMI's actions with respect to Beehive and the 10,000 numbers at issue "by ordering" DSMI's actions. *See* Jackson, 419 U.S. at 356. Accordingly, there is no "state action" alleged in the Amended Counterclaim and, thus, no claim for relief is stated under the Due Process Clause of the United States Constitution.

B. BEEHIVE FAILS TO ALLEGE A PROTECTED OR PROTECTIBLE PROPERTY RIGHT IN THE TELEPHONE NUMBERS AT ISSUE.

Beehive's alleged due process claim fails for a second, independent reason. Beehive fails to allege, as it must, any deprivation of a property or liberty interest subject to due process protection. *See* Watson v. University of Utah Medical Ctr., 75 F.3d 569, 577 (10th Cir. 1996).

Beehive alleges that it "has a constitutionally protectible property interest in the 10,000 numbers with the 629 prefix which had given [sic] to Beehive prior to the advent of the SMS/800 Tariff." (Am. Countercl. ¶ 89.) However, the tariffs in effect both at the time the numbers were first assigned to Beehive, and at the time those numbers were disconnected, expressly state that the customer has no property interest in telephone numbers. In any event, whether Beehive had a property

interest in the numbers is determined as of the time of the alleged deprivation, not at some earlier point in time. The cases cited in Section VI, *supra*, hold that a customer does not acquire a property interest in a telephone number. *See also*, Occhino, 675 F.2d at 226 ("the case authorities indicate that an individual does not have a constitutionally protected interest in telephone service"). Since Beehive has no property interest in the telephone numbers, *a fortiori* it has no constitutionally protected right to those numbers.

VIII. ALTERNATIVELY, BEEHIVE'S CLAIMS UNDER THE 1934 AND 1996 ACTS SHOULD BE REFERRED TO THE FCC UNDER THE DOCTRINE OF PRIMARY JURISDICTION, AND THE AMENDED COUNTERCLAIM SHOULD BE DISMISSED OR STAYED PENDING THE FCC'S DECISION.

The doctrine of primary jurisdiction is properly invoked "in situations where the courts have jurisdiction from the outset, but it is likely that the case will require resolution of issues, which, under a regulatory scheme, have been placed in the hands of an administrative body." Mical Communications v. Sprint Telemedia, Inc., 1 F.3d 1031, 1038 (10th Cir. 1993) (quoting Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1376 (10th Cir. 1989). Under the doctrine, "the judicial process is suspended pending referral of the issues to the administrative body for its views." *Id.* As explained below, if Beehive's claims are not dismissed for failure to state a claim, as argued in the preceding sections, then the issues raised by those claims that involve interpretation or enforcement of tariffs or of the 1934 or 1996 Acts should be referred to the FCC for initial determination. Additionally, Beehive's Amended Counterclaim based on those claims should be dismissed or stayed pending resolution by the FCC.

In Total Telecommunications Services, Inc. v. American Tel. & Tel. Co., 919 F. Supp. 472, 477-82 (D.D.C.),*aff'd*, 99 F.3d 448 (D.C. Cir. 1996), the court referred a case to the FCC in circumstances strikingly analogous to this case, where AT&T had discontinued service to the plaintiff, and the plaintiff had claimed violations of the 1934 Act, as well as of the 1996 Act. The Court stated:

> The resolution of these issues involve policy considerations concerning the public interest and technical questions relating to TTS's tariff and operating structure, that the Communications Act has vested the FCC with the mandate to determine. . . . [The FCC's] supervisory powers extend to a carrier's "charges, practices, classifications, and regulations." . . . .
>
> As a result of the Commission's mandate and pursuant to the primary jurisdiction doctrine, the FCC is the entity best suited to make the initial determination of the issues presently before the court. . . .
>
> The agency's expertise is not limited to technical matters, but extends to the agency's mandate to implement, in this case the Telecommunications Acts of 1934 and 1996, and the concomitant policy judgments it must make. . . . Were the district courts to make the initial determinations of the issues involved in this case, one of the premises of primary jurisdiction could be infringed. That is, different courts may resolve the regulatory issues before them in an inconsistent manner thereby producing disparate results.

Id. at 478 (citations omitted) The court identified relevant factors when evaluating the appropriateness of invoking the primary jurisdiction doctrine: (1) whether the question at issue is within the conventional experience of judges; (2) whether the question at issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise; (3) whether there exists a danger of inconsistent rulings; and (4) whether a prior application to the agency has been made. *Id.* Furthermore, the court held that the primary jurisdiction doctrine may be applicable even if the questions raised in a case are within the ordinary experience of the judiciary. *Id.*

With respect to the specific issues presented, the court in Total

Telecommunications held that the issues that should be decided by the FCC included (1) whether AT&T must connect its services to the plaintiff's upon plaintiff's request, *id.* at 479; (2) whether the applicable tariffs and practices of AT&T were unjust and unreasonable, *id.* at 480; (3) whether AT&T was entitled to disconnect service to the plaintiff, *id.* at 480-81, and (4) whether AT&T had discriminated against the plaintiff. *Id.* at 481-82.

This case presents the same kinds of issues that the court in Total Telecommunications held to be appropriate for resolution by the FCC. Accordingly, if those issues are not resolved on this motion to dismiss, this Court should refer Beehive's such matters to the FCC under the doctrine of primary jurisdiction.[16] *See also*, Ipco Safety Corp. v. Worldcom, Inc., 944 F. Supp. 352 (D.N.J. 1996).

A. Claims under Section 201(a) of the 1934 Act.

Section 201(a) of the 1934 Act provides:

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

Beehive apparently claims that DSMI violated Section 201(a) because DSMI is a common carrier engaged in interstate communication by wire, which failed to

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[16] Cases previously cited by Beehive in support of its motion to stay DSMI's complaint, while inapposite to that motion, do support DSMI's alternative motion to refer telecommunications issues in the amended counterclaim to the FCC. *See, e.g.*, In re Long Distance Telecommunications Litigation, 612 F. Supp. 892, 897 (E.D. Mich. 1985); AT&T v. MCI Communications Corp., 837 F. Supp. 13, 16 (D.D.C. 1993); Southwestern Bell Tel. Co. v. Allnet Communication Services, Inc., 789 F. Supp. 302 (E.D. Mo. 1992).

furnish "such communication service" upon Beehive's reasonable request. Ironically, Beehive argued vigorously before the FCC that SMS access service is not a common carrier service. 10 FCC Rcd. 10562 ¶¶ 15 et seq. (1995). Even assuming that DSMI is a common carrier under Section 201(a), the questions still remain whether the SMS/800 service and access to the SMS/800 database as a Responsible Organization, as requested by Beehive, is "interstate communication . . . by wire," 47 U.S.C. § 201(a), and whether Beehive's request for such service is reasonable under the circumstances. Courts have repeatedly held that such issues should be referred to the FCC.[17]

B. Claims under Section 201(b) of the 1934 Act.

Section 201(b) of the 1934 Act provides in pertinent part:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . . The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

Beehive claims that DSMI's "administration of the SMS/800 Tariff" constitutes an unjust and unreasonable practice in violation of Section 201(b). [Amended counterclaim ¶ 52(b)] Thus the issues that arise under Section 201(b) are whether

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[17] *See, e.g.*, Total Tel. Servs., 919 F. Supp. at 480 (question of whether AT&T must interconnect its services with plaintiffs' upon plaintiffs' request should be referred to FCC); Vortex Communications, Inc. v. AT&T, 828 F. Supp. 19, 20 (.D.N.Y. 1993) (Plaintiff's claim that telephone company's termination of three of its 900 numbers violated sections 201 and 202 of the 1934 Act involved technical issue of whether telephone number is a component of basic transmission service or a component of billing and collection service and thus was properly referred to FCC); People's Tel. Coop. v. Southwestern Bell Tel. Co., 399 F. Supp. 561, 563 (E.D. Tex. 1975) (issue under Section 201(a) of whether physical connection between two telephone companies should be at one geographical point, rather than another, required agency expertise or discretion and was properly referred to FCC); *see also* Pacific Tel. & Tel. Co. v. MCI Telecommunications Corp., 649 F.2d 1315, 1320-21 (9th Cir. 1981) (the reasonableness of a failure to provide services is an issue properly referred to the FCC).

DSMI's alleged refusal to reconnect the 800 numbers formerly assigned to Beehive, or its denial of access to the SMS/800 database to Beehive as a RespOrg, constitutes an unjust and unreasonable practice.

As with Section 201(a), courts have consistently held that claims alleging unreasonable or discriminatory practices in violation of Section 201(b) should be referred to the FCC under the doctrine of primary jurisdiction.[18]

C. Claims under Section 202(a) of the 1934 Act.

Section 202(a) of the 1934 Act provides:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Beehive claims that "DSMI has subjected Beehive to undue or unreasonable prejudice or disadvantage in violation of Section 202(a) of the Act." [Amended counterclaim ¶ 52(c)] This claim raises the issues whether DSMI is a common carrier, and whether its refusal to reconnect the 800 numbers formerly assigned to

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[18] *See, e.g.*, Total Tel. Servs, Inc., 919 F. Supp. at 480 (challenge to validity of tariff under Section 201(b) referred to FCC); Sprint Corp. v. Evans, 846 F. Supp. 1497, 1507-09 (M.D. Ala. 1994) (claims for injunctive relief raising issue of whether common carriers may refuse to carry sexually explicit information not adjudicated as obscene through 1-800 service without violating Section 201(b) referred to FCC); AT&T v. Eastern Pay Phones, Inc., 767 F. Supp. 1335, 1343 (E.D. Va. 1991) (claim that telephone companies violated Section 201(b) by charging fraudulently placed calls to private pay phone company and failing to provide fraud prevention to pay phone referred to FCC; In re Long Distance Tel. Litig., 639 F. Supp. 305, 307 (E.D. Mich. 1986) (claims of Section 201(b) violations by charging customers for uncompleted long distance call, billing for time period between call placement and completion, and failing to disclose these practices to consumers raise issues of "reasonableness" were dismissed and referred to FCC); In re Long Distance Tel. Litig., 612 F. Supp. 892, 895-99 (E.D. Mich. 1985) (reasonableness of carrier's billing practices under Section 201(b) should be determined by FCC in the first instance).

Beehive, or its refusal to permit Beehive access to the SMS/800 database as a RespOrg constitutes an "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service." 47 U.S.C. § 202(a).

As with Section 201, many cases have held that claims and issues arising under Section 202(a) should be referred to the FCC under the doctrine of primary jurisdiction.[19]

D. Claims under Section 251 of the 1996 Act.

Section 251 of the 1996 Act relates to interconnection between telephone carriers. In addition to the general duty of interconnection imposed on all telecommunications carriers, it imposes duties on local exchange carriers with regard to resale of telecommunications services, number portability, dialing parity, access to right of way, and reciprocal compensation for transport and termination of communications. Of particular interest to this case, Subsection (c) provides additional duties for incumbent LECs, including the duties to negotiate, and to provide interconnection and unbundled access to network elements; Subsection (e) deals with numbering administration, and Subsection (h) defines "incumbent local exchange carrier." Because the 1996 Act is so new, few judicial interpretations of it have been rendered. However, the FCC should have the opportunity to render the initial interpretation of the statute it is charged to administer. *See* Total

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[19] *See, e.g.*, Ad Hoc Tel. Users Committee v. FCC, 680 F.2d 790, 796 (D.C. Cir. 1982) (the FCC should be given the first opportunity to pass upon any issue of "likeness under Section 202(a)); Total Tel. Servs., 919 F. Supp. at 481-82 (claim of discrimination in violation of Section 202 is properly within the province of the FCC); Sprint Corp., 846 F. Supp. at 1507-09 ("Determining a common carrier's obligations under §§ 201, 202, and 223 of the Act is plainly with the 'special competence' of the FCC."

Telecommunications Services, Inc. v. American Tel. & Tel. Co., 919 F. Supp. 472, 477-82 (D.D.C.), *aff'd,* 99 F.3d 448 (D.C. Cir. 1996).

Each Count in Beehive's Amended Counterclaim requires examination, interpretation, enforcement, or application of portions of the 1934 or 1996 Acts, or the SMS/800 Tariff. If the Court determines that genuine issues exist relative to some of Beehive's claims, for which the expertise of the FCC should be sought, or which involve questions of national telecommunications policy which should more properly be addressed by the FCC, then the Court should refer such matters to the FCC, and dismiss or stay the proceedings in this case pending the FCC's action.

CONCLUSION

Beehive's amended counterclaim seeks to impose liability on DSMI under the 1934 and 1996 Acts. Liability under those Acts can only be imposed on common carriers or incumbent LECs, yet DSMI is neither. Therefore, Beehive's amended counterclaim does not state a claim against DSMI on which relief can be granted, and should be dismissed. In the alternative, if DSMI's potential liability under the 1934 or the 1996 Acts presents a genuine issue, then the amended counterclaim should be referred to the FCC under the doctrine of primary jurisdiction, because the FCC should first decide questions of interpretation of tariffs, application of the 1934 and 1996 Acts, and federal regulatory policy in the telecommunications industry.

Dated this 21st day of February, 1997.

RAY, QUINNEY & NEBEKER

By _____
Floyd A. Jensen
Attorneys for Database Service Management, Inc.

Certificate of Service

I hereby certify that on this 21st day of February, 1997, I caused a copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AMENDED COUNTERCLAIM OR, IN THE ALTERNATIVE, TO REFER CERTAIN CLAIMS TO THE FEDERAL COMMUNICATIONS COMMISSION, AND TO STAY ACTION PENDING REFERRAL to be hand delivered to the following:

Alan L. Smith
31 L Street, No. 107
Salt Lake City, Utah 84103

David R. Irvine
124 South 600 East, Suite 100
Salt Lake City, Utah 84102

and to be mailed by United States mail, postage prepaid, to

Janet I. Jenson
WILLIAMS & JENSEN
1155 21st St., N.W., Suite 300
Washington, D.C. 20036

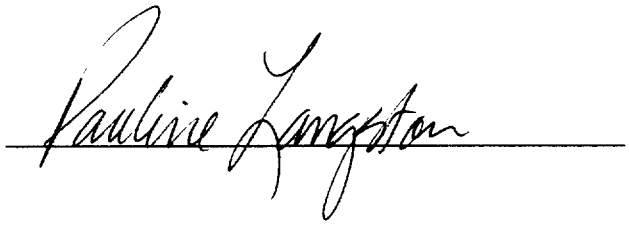

Exhibit A

Bellcore

SAIC
An Employee-Owned Company

Jane Van Ryan, SAIC
202-628-0304
201-829-2166 (11/21/96 only)

Barbara McClurken, Bellcore
201-829-2164

For Release November 21, 1996

SAIC TO ACQUIRE BELLCORE

SAN DIEGO, CA - Science Applications International Corporation (SAIC) announced today that it has agreed to purchase Bell Communications Research, Inc. (Bellcore), a leading global provider of communications software, engineering, and consulting services. Bellcore currently is owned by the Regional Bell Operating Companies (RBOCs) which include Ameritech, Bell Atlantic, BellSouth, NYNEX, Pacific Telesis Group, SBC Communications, and U S WEST or their affiliates. The transaction is expected to be finalized in late 1997 after Bellcore's owners obtain the requisite regulatory approvals.

Bellcore's Board of Directors announced early last year that Bellcore's owners were considering selling the company as a result of changing developments in the telecommunications industry and the owners' diverging strategies and business plans.

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